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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. [redacted]110

BETTY J. WORRELL, *Petitioner*

v.

GEORGE W. MATTERS, ET AL.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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Betty J. Worrell prays that a writ of certiorari issue to review the decision of the Supreme Court of Pennsylvania in the above-entitled case filed January 17, 1967.

REPORTS OF THE OPINIONS OF THE COURT BELOW

The opinions of the Pennsylvania Supreme Court reported at 424 Pa. 202 and 226 A.2d 53. They are appended to this petition as Appendices A to E.

JURISDICTION

The judgment of the court below is dated and was entered on January 17, 1967.

The jurisdiction of this court is based on Section 1257, Title 28, United States Code, providing for appeal to this court where the constitutionality of a state statute is challenged and upheld by the highest appellate court of the state.

QUESTIONS PRESENTED

1. Does the First Amendment to the Constitution of the United States forbid the Legislature of the Commonwealth of Pennsylvania from requiring the use of public school buses for the transportation of pupils to sectarian religious schools at public expense?

2. Is the statute in question, which requires the public school districts to provide free transportation of pupils who attend nonpublic elementary and high schools not operated for profit, so vague and indefinite as to violate due process of law?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment I. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof: . . .

United States Constitution, Amendment XIV, Section 1. . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; . . .

Act of the Legislature of the Commonwealth of Pennsylvania, Act No. 91 approved June 15, 1965, Pamphlet Laws, p. 126, 24 Purdon's Statutes Annotated, Section 13-1361 (Pocket Part).

An Act amending the act of March 10, 1949 (P.L. 30), entitled "An act relating to the public school system, including certain provisions applicable as well to private and parochial schools; amending, revising, consolidating and changing the laws relating thereto," further providing for the health, welfare and safety of the children of the Commonwealth by requiring school districts under certain circumstances to provide free transportation of pupils attending nonpublic elementary and high schools not operated for profit.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1.

Section 1361, act of March 10, 1949 (P.L. 30), known as the "Public School Code of 1949," is amended to read:

Section 1361. When provided

The board of school directors in any school district may, out of the funds of the district, provide for the free transportation of any resident pupil to and from the public schools and to and from any points in the Commonwealth in order to provide tours for any purpose connected with the educational pursuits of the pupils. When provision is made by a board of school directors for the transportation of resident pupils to and from the public

schools, the board of school directors shall also make provision for the free transportation of pupils who regularly attend nonpublic elementary and high schools not operated for profit. Such transportation provided for pupils attending nonpublic elementary and high schools not operated for profit shall be over established public school bus routes. Such pupils shall be transported to and from the point or points on such routes nearest or most convenient to the school which such pupils attend. The board of school directors shall provide such transportation whenever so required by any of the provisions of this act or of any other act of Assembly.

Section 2.

The amendments made by this act shall not be so construed as to limit or reduce in any way the payments now made by the Commonwealth to various school districts to help defray the cost of transporting pupils and the additional costs incurred by the boards of school directors in furnishing transportation under said amendments shall be included in the amounts for which reimbursement may be received from the Commonwealth as now provided by law.

Section 3.

This act shall take effect July 1, 1965.

Approved the 15th day of June A. D. 1965.

STATEMENT OF THE CASE

In 1965 the General Assembly of the Commonwealth of Pennsylvania amended the Public School Code of 1949, Section 1361, to provide for free transportation of elementary and high school students who regularly attend nonpublic, nonprofit schools.

In compliance with the amendment, the Rose Tree Union School District, located in Delaware County, Pennsylvania, approved the expenditure of funds of the school district to provide for bus transportation for nonpublic school pupils, most, if not all, of whom attend a sectarian school.

On August 31, 1965, plaintiff filed an action in the Court of Common Pleas of Delaware County against the school directors asking for an injunction to prevent the directors from expending any further sums of money for the purpose of implementing the Act of the Assembly.

Defendant school directors filed an answer to plaintiff's amended complaint admitting the proposed expenditures and that said expenditures would be used for the transportation of pupils to a sectarian school or schools.

On September 3, 1965, six individuals (three couples) having children in attendance at three separate Roman Catholic schools in Delaware County, filed a petition to intervene as defendants, averring that their rights under the school busing law would be affected by the litigation, and further, that the grant of an injunction against implementation of the law would deprive them of their religious liberty under the First Amendment. The Common Pleas Court gave leave to intervene.

The Attorney General of the Commonwealth of Pennthe Pennsylvania Supreme Court. The petition was granted. sylvania also intervened and filed a petition for certiorari to

Thereafter, counsel in a similar case arising in Philadelphia County filed a petition for leave to intervene and the court granted that petition and a similar petition from the School District of Philadelphia.

This case and a case arising in Montgomery County, Pennsylvania were heard together. In five separate opinions, the court below upheld the constitutionality of the Pennsylvania act by a five to two majority.

The validity of the act under the United States Constitution was raised in paragraph 7 of the Amended Complaint, Appendix F, page 73a hereof. The Supreme Court of Pennsylvania upheld the constitutionality of the busing law beginning at page 2a of its opinion, Appendix A hereof.

ARGUMENT

1. This case involves that portion of the First Amendment to the Constitution regarding the establishment of religion and is of great concern to the citizens of the United States.

Probably no section of American law has produced so much litigation and been the subject of so much legal opinion as the section involved here. This area of the law is clouded with doubt and confusion, and for the good of all concerned a more definitive decision from this court is needed.

The decision of this court (*Everson v. Board of Education*, 330 U.S. 1), which the court below deemed controlling, was decided twenty years ago by a court divided 5 to 4. Since that decision this court has considered a number of other cases involving the establishment clause of the First Amendment which have cast some question on its validity. As a matter of fact, Justice Douglas, who joined in the majority opinion in *Everson* stated in *Engel v. Vitale*, 370 U.S. 421, that the *Everson* case appeared to be out of line with the other decisions of this court in this area of the law.

The majority of decisions concerning free transportation for religious schools which have been decided since *Everson* have criticized the result in *Everson* while extolling the virtues of the principles set out in the opinions in that case. The greater number of state courts have agreed with Justice Jackson, who likened the majority opinion to Byron's Julia, who "whispering 'I will ne'er consent,'—consented."

In order to avoid the result in *Everson*, state courts have resorted to some hypocrisy in finding some provision in their state constitutions (even though they are nothing but an elaboration of the First Amendment) to strike down the legislation.[1]

2. The so-called "child benefit" theory, which has evolved from *Everson* is illogical and difficult to apply. Every element of the educational program of an institution is "primarily for the benefit of the child" and therefore, constitutional under that rationale. In the typical school system of today transportation is a very important part of the system. The state legislature of Pennsylvania has forced school districts to consolidate into regional systems which require the busing of pupils for greater distances than was necessary just a couple of years ago. Private and parochial schools have followed suit, and nearly all of them have acquired their own transportation systems. Obviously, the assumption of the expense of transporting pupils by the public school districts relieves the nonpublic schools of a financial burden. In *State v. Nusbaum* (supra, fn. 1) the Supreme Court of Wisconsin stated:

> "Those parochial schools, which now pay part or all of the cost of transportation of their pupils out of

1—See, for example, *Matthews v. Quinton*, (Alaska), 362 P. 2d 932; *Board of Education v. Antone*, (Okla.), 384 P. 2d 911; *Squires v. Inhabitants of City of Augusta*, (Me.), 153 A2d 80; *State v. Nusbaum*, (Wis.), 115 N.W. 2d 761; *Visser v. Nooksack Valley School District*, (Wash.), 207 P. 2d 198; *Judd v. Board of Education*, (N. Y.), 15 N.E. 2d 576; *Traub v. Brown*, (Dela.), 172 A. 835; *McVey v. Hawkins*, (Mo.), 258 S.W. 2d 927.

their school funds, stand to benefit financially by the operation of the new act. Others stand to gain through increased enrollment. Such an increase in enrollment is a benefit to these parochial schools.

"It must be conceded that there are benefits to religious organizations and parochial schools resulting from the expenditures of public funds which are not a violation of this constitutional prohibition. Examples are the providing of police and fire protection, the supplying of water and sewerage services on a basis whereby the cost of the system or service is not charged to the users, and the building and improving of public sidewalks and streets. However, all of these public services are provided to the public or the property, generally on a basis whereby no classification is made as to the religious organizations or schools. It is this which distinguishes these benefits from those sought to be conferred by the instant act. Mr. Justice Jackson pointed out this line of demarcation in his penetrating dissenting opinion in *Everson v. Board of Education,* (citation) in these words:

> 'A policeman protects a Catholic, of course—but not because he is a Catholic; it is because he is a man and a member of our society. The fireman protects the Church school—but not because it is a Church school; it is because it is property, part of the assets of our society. Neither the fireman nor the policeman has to ask before he renders aid "Is this man or building identified with the Catholic Church."

The following portion of *Judd v. Board of Education* (supra, fn. 1) has been quoted with approval by several courts:

> "Free transportation of pupils induces attendance at the school. The purpose of the transportation is to promote the interests of the private school or religious or sectarian institution that controls and directs it. 'It helps build up, strengthen and make successful the schools as organizations.' State ex rel. Traub v. Brown, 6 W.W. Harr., 36 Del. 181, 172 A. 835, 837, writ or error dismissed Feb. 15, 1938, Del. Supp. 197 A 478. Without pupils there could be no school. It is illogical to say that the furnishing of transportation is not an aid to the institution while the employment of teachers and furnishing books, accommodations and other facilities are such an aid."

In the words of Justice Cohen of the Pennsylvania court (Appendix E, page 64a):

> "The act in question violates, in my opinion, both the Pennsylvania Constitution and the Federal Constitution, and is further void for vagueness and incompleteness. Moreover, it is premised upon the subterfuge of the 'child benefit' theory, . . . * * *
>
> "Regarding the First Amendment, I recognize the apparent binding effect of *Everson v. Board of Education*, 330 U.S. 1 (1947). However, I believe that certain more recent statements of the Supreme Court have to a great extent diminished the force and impact formerly enjoyed by *Everson*. [citing *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203 (1947); *Torasco v. Watkins*, 367 U.S. 488 (1961); *Engel v. Vitale*, 370 U.S. 421

(1962); and *Abington School District v. Schempp*, 374 U.S. 203 (1963)]

"* * * I should like the United States Supreme Court finally to decide this case so that they may reconsider the *Everson* doctrine."

3. The only basis for sustaining the constitutionality of the busing law is that it is primarily a law providing for the safety of children. That safety is not the principal consideration in busing school children in Pennsylvania is obvious from a reading of the provisions in the code for busing.

An examination of other provisions of the School Code indicates that safety was not the predominant motive for the passage of this act. Art. XXV, Sec. 2541 of the Public School Code provides for the reimbursement to predominantly rural school districts for the cost of transportation of pupils to schools. That section provides for state reimbursement to school districts for the transportation of elementary school pupils who live more than one and one half miles from their schools and for high school pupils who live more than two miles from their schools. This section would, of course, apply to pupils transported to private and parochial schools under Act 91. This shows very clearly that the legislature has not been motivated by a concern for the safety of pupils, but by the practical necessity of transporting pupils who live too far from their schools to walk.

If safety were the criterion, then pupils living in the more populous areas would also have to be transported. Everyone knows that city streets are much more dangerous to the safety of children than are country roads. Hundreds of thousands of pupils walk the treacherous streets of Philadelphia and Pittsburgh every day on their way to and from school.

The statute itself is designed to increase the hazards of children who were previously transported from their homes to private or parochial schools by private buses or autos. The act says: "Such pupils shall be transported to and from the point or points on . . . [established public school bus] routes nearest or most convenient to the school which such pupils attend."

This provision ignores completely the hazards at the points of intake and discharge of the pupils. It utterly disregards the hazards and perils that might be present from such points to the home and schools of such pupils. How can such a provision provide for the welfare and safety of students who previous were transported from their homes to their schools? Obviously it cannot; it can only make their journeys less safe.

Moreover, nonpublic school children who do not live near an established bus route will still face the same traffic hazards as they did before. Therefore, it can hardly be claimed that the framers of the act had in mind in any degree the welfare of the children whose exposure to traffic hazards may or may not be reduced and perhaps might be increased. It can hardly be claimed that this haphazard approach to the "safety" problem is intended to be a welfare measure to assist the child.

When faced with a similar set of facts, the highest court of Alaska noted:

> "But this intent of the legislature to protect the health and safety of all school children in Alaska was not carried out in the statute erected. The only nonpublic school children entitled to free transportation under Chapter 39 are those who must travel comparable dis-

tances and the same routes over which the children attending public schools are transported. In other words, nonpublic school children who are fortunate enough to be living along a public school bus route are given transportation. All other nonpublic school children living within the two mile compulsory attendance limit and more than one and one-half miles from their school are left to fend for themselves.

"It cannot be truthfully said that the severe winter weather and the highways without sidewalks around Fairbanks are less hazardous to the health, welfare and safety of the nonpublic school child who does not live along a school bus route and therefore has to walk to school than to the health, welfare and safety of his classmate who rides because his home is along the route. Nor can anyone say that the public school first grader, who lives 1.49 miles from his school and has to walk will feel the cold less than, and not have to face the same traffic risks as, an older sixth grader of the nonpublic school who gets to ride on the public school bus because he lives along the bus route and at a distance of 1.51 miles from the nonpublic school of his choice.

* * * All we are saying at this time is that Chapter 39 does not effectuate the intent expressed therein of the legislature.

"Turning now to the argument that the transportation of school children to nonpublic schools on public school buses is of direct benefit only to the child, we say again that, in our opinion, the furnishing of such transportation at public expense constitutes a direct benefit to the school. This was the view expressed by the courts of Delaware, New York, Oklahoma, Washington and Ken-

tucky, and it was the view favored by the dissenting jurists in Maryland, Louisiana (in a textbook case), and New Jersey, where the state courts have adopted the child benefit theory, and by the four disenting Justices of the United States Supreme Court in *Everson v. Board of Education.* Said Mr. Justice Rutledge in the Everson case:

'Finally, transportation, where it is needed, is as essential to education as any other element. Its cost is as much a part of the total expense, except at times in amount, as the cost of textbooks, of school lunches, of athletic equipment, of writing and other materials; indeed of all other items composing the total burden. Now as always the core of the educational process is the teacher-pupil relationship. Without this the richest equipment and facilities would go for naught. See Judd v. Board of Education, 278 N. Y. 200, 212, 15 N.E. 2d 576, 118 A.L.R. 789. But the proverbial Mark Hopkins conception no longer suffices for the country's requirements. Without buildings, without equipment, without library, textbooks and other materials, and without transportation to bring teacher and pupil together in such an effective teaching environment, there can be not even the skeleton of what our times require. Hardly can it be maintained that transportation is the least essential of these items, or that it does not in fact aid, encourage, sustain and support, just as they do, the very process which is its purpose to accomplish. No less essential is it, or the payment of its cost, than the very teaching in the classroom or payment of the teacher's sustenance. Many types of equipment, now considered essential, better could be done without.

'For me, therefore, the feat is impossible to select so indispensable an item from the composite of total costs, and characterize it is not aiding, contributing to, promoting or sustaining the propagation of beliefs which it is the very end of all to bring about. Unless this can be maintained, and the Court does not maintain it, the aid thus given is outlawed. Payment of transportation is no more, nor is it any the less essential to education, whether religious of secular, than payment for tuitions, for teachers' salaries, for buildings, equipment and necessary materials. Nor is it any the less directly related, in a school giving religious instruction, to the primary religious objective all those essential items of cost are intended to achieve. No rational line can be drawn between payment for such larger, but not more necessary, items and payment for transportation. The only line that can be drawn is one between more dollars and less. Certainly in this realm such a line can be no valid constitutional measure.'

4. The only reason for the existence of religious schools is to teach religion. The secular education provided, even though it may consume the greater part of the school day, is required by state law. But it is the religious instruction that is the reason for being of religious schools. Many taxpayers disagree with the doctrines of one or more religious bodies. No one should be compelled to help support institutions that teach religious tenets with which he disagrees. Madison, in his famous "Memorial", said that it was "sinful and tyrannical" to compel a man to contribute money to propagate opinions which he disbelieves. He further said,

"It is proper to take alarm at the first experiment on our liberties."

Many Americans are alarmed at what seems to be an ever-widening breach in the wall of separation between church and state. Political expediency has clouded principle, and only this court can clarify the law on this vital issue.

In the case at hand public property is being used to advance sectarian religious causes contrary to the prohibition established by the founding fathers. At least, in the *Everson* case, no public property was used for the transportation of pupils to religious schools, but here the public school buses are being used at the direction of the state legislature. The state has departed from the position of neutrality and is actually supporting religious institutions.

5. The act in question is so vague and indefinite that it violates the due process provision of the Fourteenth Amendment to the constitution.

The Pennsylvania statute requires school districts to provide free bus transportation for pupils who attend "nonpublic elementary and high schools not operated for profit." Such transportation is to be furnished "over established public school bus routes." The pupils are to be transported to and from points on such routes "nearest or most convenient to the schools which such pupils attend."

Nowhere are these terms defined. The Pennsylvania Attorney General advised the Department of Public Instruction that bus routes could be "reestablished to better accommodate nonpublic school pupils and that the public school system could acquire or lease buses from nonpublic schools.

The place of residence of the "pupils" is not limited, which results in taxpayers paying for transportation of nonresident children to private schools in the district. Depending upon the interpretation of the Act, taxpayers in a given district could find themselves burdened with a huge financial obligation for transporting children within their district even though most or all of them did not live in the district.

This court has declared statutes null and void because of vagueness. *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926); *Yu Cong Eng. v. Trinidad*, 271 U.S. 500 (1926); *Winters v. New York*, 333 U.S. 507 (1947); *Stromberg v. California*, 283 U.S. 359 (1931); *Herndon v. Cowry*, 301 U.S. 242 (1937). See also *Note, The Void-For-Vagueness Doctrine*, 109 U. of Pa. Law Rev.. 67 (1960).

Taxpayers are entitled to clearly defined boundaries for which their money is to be spent. Administrators should not be given carte blanche with tax funds. The authority to expend tax monies should not be delegated to administrative boards, but should be clearly circumscribed by statute.

As Justice Cohen pointed out in his dissent, "the Attorney General assumed the role of our overseer of the legislature and rather than interpret the act, saw fit to write his own version simply because the statute passed by the General Assembly was incomplete and unworkable." (p. 4 Appendix E) 66a

For the foregoing reasons petitioner respectfully requests the court to grant the prayer of this petition.